

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MAXIMILLIAN SALAZAR III,

NO. CV-12-0186-LRS

Plaintiff,

**ORDER RE PLAINTIFF'S MOTION
FOR PARTIAL RECONSIDERATION
OF COURT'S RULING ON
DEFENDANTS' MOTIONS IN
LIMINE**

-vs-

MONACO ENTERPRISES, INC.,
GENE MONACO, and ROGER
BARNO,

Defendants.

BEFORE THE COURT, and now under advisement, is Plaintiff's [Motion for] Partial Reconsideration of Court's Order on Defendants' Motions in Limine, ECF No. 370, filed on February 25, 2015.

Plaintiff Maximillian Salazar III requests reconsideration based on "clear error" of the following rulings regarding Defendant Monaco Enterprises, Inc. ("MEI"), Defendant Gene Monaco, and Defendant Roger Barno's (collectively "Defendants") Motions in Limine (ECF No. 269) made at the

1 February 19, 2015 Motion Hearing: 5, 16, 48, 53, 65, 72, 83,
2 and 98. Plaintiff also requests reconsideration of the
3 following rulings made with regard to Defendants' Exhibits:
4 101 and 102. The Court will address Plaintiff's requests for
5 reconsideration of these matters below.
6

7 A motion for reconsideration can only be granted when a
8 district court: (1) is presented with newly discovered
9 evidence; or (2) committed clear error or the initial decision
10 was manifestly unjust; or (3) there has been an intervening
11 change in controlling law. *Dixon v. Wallowa County*, 336 F.3d
12 1013, 1022 (9th Cir. 2003).
13
14

15 **A. Motions In Limine ("MIL")**

- 16 1. **MIL 5:** Any reference or evidence to other proceedings
17 or investigations whether filed or unfiled.
18

19 The Court granted MIL 5 at the motions hearing. Plaintiff
20 argues that the best evidence that Salazar believes MEI was
21 committing fraud is his later report of that fraud to the U.S.
22 Government. Plaintiff argues as the relator in a Qui Tam
23 proceeding, he should be able to testify to the fact that the
24 U.S. Government initiated said Qui Tam proceeding. Plaintiff
25 asserts that it is clear in the Ninth Circuit that
26

1 consolidated Qui Tam and retaliation cases allow such evidence
2 to be considered.

3
4 Defendants argue that the status or pursuit of other
5 proceedings against MEI are irrelevant to this litigation.
6 Defendants further argue that anything Plaintiff did after he
7 was terminated is not relevant.

8
9 The Court will deny Plaintiff's request to reconsider MIL
10 5 based on the reasons expounded in the Orders Denying
11 Consolidation of Cases (ECF Nos. 274, 311).

12 2. **MIL 16:** Any and all reference to or evidence of
13 gross or net profits, profitability or lack thereof
14 of MEI.

15 The Court reserved its ruling on MIL 16. Plaintiff
16 requests the Court to deny MIL 16 based on the possible need
17 to impeach individual defendant(s). The Court refrains from
18 reconsidering its prior ruling in recognition of needing
19 contextual information in order to rule on this motion.
20

21 3. **MIL 48:** Any and all statements by any witness
22 expressing a personal opinion that MEI 'over
23 charging,' 'over billing' or 'gouging' the government
or other customers.

24 The Court granted MIL 48. Plaintiff argues the testimony
25 of others that shared Mr. Salazar's concern is the best
26

1 evidence that a "reasonable employee in the same or similar
2 circumstances" would have believed MEI might be committing
3 fraud, the objective belief element of his FCA retaliation
4 claim.
5

6 Defendants assert that the Court has already stated that
7 it will allow Plaintiff to make an offer of proof for this
8 type of testimony if Plaintiff can show that any such
9 termination of another MEI employee was sufficiently similar
10 to Salazar's.
11

12 In light of the Court's reconsideration of the
13 relationship¹ between Title VII's anti-retaliation provision
14 and the FCA whistleblower statute, the Court will reconsider
15 its earlier ruling and reserve ruling on MIL 48 for the
16 purpose of enabling admissible evidence of the objective
17 belief element of Plaintiff's FCA retaliation claim to be
18 received. In particular, evidence that a "reasonable employee
19 in the same or similar circumstances" would have believed MEI
20 was allegedly committing fraud may, if otherwise admissible,
21
22
23

24 ¹In adopting the [reasonable belief] standard, the *Moore* court drew
25 upon its interpretation of Title VII's anti-retaliation provision. See
26 *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 n.
1 (9th Cir.2002)(citing *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526
(9th Cir.1994)).

1 be heard. Free floating hearsay will not qualify for
2 admissibility.

3
4 4. **MIL 53:** Any reference to MEI employee attrition,
5 termination, layoffs, or firings including Scott
6 Barrick, Brenda Osborne or Jake Osborne, or any
employee other than Mr. Salazar.

7 Plaintiff asserts that MIL 53 is overly broad and although
8 the Court granted the motion, it remarked that Plaintiff could
9 make an offer of proof at the appropriate time for the
10 admission of such evidence. Plaintiff argues this ruling was
11 in error because such evidence is relevant and admissible to
12 provide circumstantial evidence of the employment environment
13 at MEI during this time period and to help explain the
14 pretextual basis for Plaintiff's termination.
15

16
17 Defendants argue that if Plaintiff had evidence that the
18 departures of Mr. Barrick, Ms. Osborne or Mr. Osborne
19 correlated to Plaintiff's termination, he certainly would have
20 pointed that information out to the Court. But they have
21 failed to do so.
22

23 The Court will reconsider its earlier ruling and **RESERVE**
24 on MIL 53, recognizing that it may be appropriate to develop
25 ///
26

1 the evidence of pretext and retaliation through circumstantial
2 evidence.

- 3
4 5. **MIL 65:** Any and all reference to or evidence that any
5 employee brought any concerns to MEI management's
6 attention of alleged waste, fraud or abuse in the
7 absence of a showing, outside the presence of the
8 jury, that said employee was thereafter terminated by
9 MEI.

10 The Plaintiff has not shown that the Court's ruling is
11 clearly in error. However, in an abundance of caution and in
12 light of all the factors impacting trial, the Court will
13 reserve.

- 14 6. **MIL 72:** Any reference to insurance coverage and/or
15 settlement negotiations.

16 The Court will not reconsider its earlier ruling.

- 17
18 7. **MIL 83:** Precluding/preventing plaintiff from
19 questioning witnesses out of court statements made by
20 various witnesses in the case to elicit whether the
21 witness agrees or disagrees with the opinions,
22 conclusions, surmise and conjecture contained therein.

23 The Court will reserve until the content is before the
24 Court.

- 25 8. **MIL 98:** Evidence or testimony relating to
26 alleged complaints about MEI's compliance or lack of
compliance with wage and hour laws, made by Jake
Osborne, Jason Voss or other employees

1 Plaintiff argues that this information, like over-billing
2 for travel expenses, is relevant to the alleged fraudulent
3 activity at or about the time of Salazar's termination.
4

5 Defendants assert that complaints made by other employees
6 regarding unrelated issues have nothing to do with Salazar's
7 claims. Defendants note that Plaintiff has never complained
8 about wage and hour laws in his case.
9

10 The Court earlier reserved on this issue until a nexus is
11 shown between the complaints and retaliation of an employee
12 making such complaints. Therefore, the earlier ruling will not
13 be changed.
14
15

16 **B. Exhibits 101** (2011 Employee Handbook) and **Exhibit 102**
17 (Acknowledgment of At-Will employment Status signed by
18 Plaintiff, dated 6/7/2011)

19 Plaintiff argues that in light of what he perceives as
20 the Court's "restraints in other areas surrounding
21 Plaintiff's case," it would be error to admit evidence or
22 argument of Mr. Salazar's at-will employment status through
23 the Employee Handbook. Plaintiff, in conjunction with this
24 motion, withdraws his own Exhibit 1, the 2011 employment
25 manual.
26

1 Defendants oppose such motion explaining that if the
2 Plaintiff cannot prove that his termination was retaliatory,
3 the jury has a right to know that MEI was at liberty to
4 terminate him.
5

6 The Court stands by its earlier ruling admitting Exhibits
7 101 and 102 recognizing that a jury instruction will likely be
8 needed to explain the tension inherent in the components of an
9 FCA claim and at-will employment.
10

11 Accordingly,

12 **IT IS HEREBY ORDERED** that: Plaintiff's [Motion for]
13 Partial Reconsideration of Court's Order on Defendants'
14 Motions in Limine, **ECF No. 370, GRANTED** in part and **DENIED** in
15 part.
16

17 **IT IS SO ORDERED.** The District Court Executive is
18 directed to enter this Order.
19

20 **DATED** this 5th day of June, 2015.

21 ***s/Lonny R. Suko***

22
23

LONNY R. SUKO
24 SENIOR UNITED STATES DISTRICT JUDGE
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